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**In the Supreme Court of the United States**

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CABLE, TELECOMMUNICATIONS, AND  
TECHNOLOGY COMMITTEE OF THE  
NEW ORLEANS CITY COUNCIL,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,  
*Respondents.*

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*On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit*

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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## ARGUMENT

The issue of whether a court should apply *Chevron* deference to review an agency's determination of its own jurisdiction, is one that has certainly garnered some attention in the past by the courts and those in academia. To this point, it appears that the response to this inquiry may be tenuously in the affirmative. However, with the granting of the current writ applications, this Court has decided that the issue merits further inquiry. In fact, in granting the writ applications, this Court intentionally limited the inquiry to that specific issue. Presumably, this was intended to make the parties thoroughly examine the issue over and above the arguments already presented, as there would be no need to grant certiorari if the previous arguments were resilient and determinative.

Despite this fact, the Federal Respondents have presented this Court with only a duplication of the arguments previously advanced in favor of *Chevron* deference. If these arguments were overwhelmingly persuasive to this Court, there would have been no need to grant certiorari in the first place. Each of the Federal Respondents' arguments lack merit and are outdated. As such, this Court should summarily discard the Federal Respondents' arguments for the multiple reasons more fully explained herein.

(A) **CHEVRON DEFERENCE, IN THE CONTEXT OF AN AGENCY'S DETERMINATION OF ITS OWN JURISDICTION, DOES NOT REFLECT CONGRESSIONAL INTENT.**

The Federal Respondents first argue that *Chevron* reflects congressional intent and principles of democratic accountability. See Fed.Resp. Br. 15. To support this contention, they rely upon the standard talking point that agencies have expertise superior to that of the courts in their "technical and complex" fields. See Fed.Resp. Br. 16. They offer no legitimate support for this principle, but rather only make conclusory statements that the principle has merit. Thus, they attempt to frame the inquiry as one in policymaking, and argue that agency expertise stems from the familiarity with the issues that result from the agency's day to day administration of the statute.

There is one problem with the Federal Respondents' argument. It does not address the issue presented by this Court in these proceedings. This Court requested that the parties examine *Chevron* deference solely in the context of an agency's determination of its own jurisdiction. Jurisdiction is not a policy question, it is rather a question of law and statutory intent. An agency's supposed expertise regarding policy questions in connection with a particular statute has no bearing on its ability to interpret statutes regarding its jurisdiction. "Determining the existence or scope of agency authority, unlike answering a complex technical or scientific question or making a policy judgment about how best to implement a regulatory regime, requires answering a question of law about whether Congress delegated authority to a given regulatory



agency.” Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, & Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1537 (2009). Thus, the “technical or complex” nature of the agency’s field, and the agency’s expertise therein, is completely irrelevant to the inquiry this Court requested that the parties address. In fact, while an agency may claim special expertise relative to policymaking, which would conceivably make the argument in support of *Chevron* deference viable, “agencies can claim no special expertise in interpreting a statute confining its jurisdiction.” See *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting). Therefore, the special expertise argument, in connection with jurisdictional questions, has no merit because agencies have no greater expertise than courts in that area. Actually, the reverse is true. Courts, and not agencies, are required to address jurisdictional questions implicating the scope of federal power on a routine basis. So the courts actually have more expertise interpreting statutory jurisdiction than agencies.

Consequently, the notion that agencies somehow have more expertise than courts involving questions of an agency’s jurisdiction is fatally flawed. Therefore, this argument should be dismissed summarily as lacking merit. As this is a prominent argument in the Federal Respondents’ reply, their response is left woefully wanting.

(B) **CHEVRON DEFERENCE, IN THE CONTEXT OF AN AGENCY'S DETERMINATION OF ITS OWN JURISDICTION, DOES NOT PROMOTE DEMOCRATIC ACCOUNTABILITY.**

The Federal Respondents' second argument is just as erroneous as the first. They contend that the application of *Chevron* deference promotes democratic accountability. In other words, they contend that the congressional delegation of policymaking authority, necessary to achieve gap filling of ambiguous statutes, should be reserved for a politically accountable branch of government, rather than politically unaccountable judges. In addition to again failing to address the issue at hand, as *jurisdiction* and not policymaking is the issue, this reasoning has one major achilles heel in this circumstance – the FCC is an independent agency and is far less politically accountable than the executive branch agencies with respect to policy making actions. Thus, the political accountability contemplated by the argument is really non-existent when it comes to independent agencies like the FCC.

Independent agencies, such as the FCC, have considerably greater freedom from presidential control than executive agencies. One major difference is a lack of presidential removal power with respect to independent agencies. See Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376 (2001). This independence from the executive branch completely undermines the Federal Respondents' argument of democratic accountability. Independent agencies certainly are not accountable to any constituency and they are, for the most part, immune from political repercussions such as removal. They, in



essence, have no head to report to, and “it is odd in a constitutional system with three defined branches, for courts to give controlling deference to agencies that, not without reason, are commonly referred to as ‘the headless fourth branch.’” Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 Admin. L. Rev. 429, 451 (2006).

In 2001, then Professor Elena Kagan pointed out that independent agencies, such as the FCC, are not sufficiently accountable to either the President or Congress. “Apart from what she calls ‘the institutional characteristics that make Congress a less reliable overseer of agency action than the President’, Kagan emphasizes that ‘the constitutional limits on Congress’s ability to establish a hierarchal relationship with the independent agencies (most notably, by retaining removal power over their heads) preclude equating the two kinds of control.” Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 Admin. L. Rev. 429, 444 (2006) (quoting from Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376, 2377 n. 506 (2001)).

Political accountability ultimately revolves around one simple principle – removal power. As this Court stated in *Humphrey’s Executor v. United States*, “...one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.” *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935). Neither the President nor Congress have the independent ability to remove agency commissioners without cause. The lack of this removal power necessarily correlates to a sufficient lack of

political accountability, which is a crucial element to the Federal Respondents' argument. Without it, Respondents' argument is simply smoking mirrors.

The *Chevron* Court pointed to the political accountability of the Environmental Protection Agency ("EPA") as support for deference. See *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). However, the EPA is an executive agency accountable to the President of the United States. The FCC is an independent agency and, for the most part, accountable to no branch of government. Some argue that independent agencies are, in fact, accountable to Congress. However, while Congress may influence agency actions through investigatory or oversight hearings, without actual removal power, that influence certainly does not rise to the level of political accountability for policymaking, which the *Chevron* rationale primarily rests upon. See Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 Admin. L. Rev. 433, 455 (2010).

*Chevron* deference was not primarily premised on agency expertise, and even if it was, that expertise could not be applied to the interpretation of statutory construction and meaning, as same is an inherent function of the judicial branch. Rather, *Chevron* deference was premised principally on the notion that there should be political accountability for policy choices that Congress did not make itself. However, as Justice Breyer pointed out in his dissent in *Fox Television Stations, Inc. v. FCC*, an independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its

decisionmaking to assure compliance with applicable provisions of law.” *Fox Television Stations, Inc. v. FCC*, 129 S.Ct. 1800, 1830 (2009) (Breyer, J., dissenting). Justice Kagan expounded in her article and explained that independent agencies are also really not accountable to Congress or the President. Given same, it is clear that one of the Federal Respondents’ major arguments, political accountability, really is non-existent in this instance. Without it, Respondents ultimate argument – that *Chevron* deference is proper in this case – is unsustainable.

As a result, the two major arguments advanced by the Federal Respondents in their brief, agency expertise and political accountability, are both without merit. Given same, neither can be used convincingly to maintain the application of *Chevron* deference by the Fifth Circuit to the actions of the FCC in this matter. Consequently, this Court should reject those arguments and rule that *Chevron* deference is not proper in this matter.

**(C) THE FUNDAMENTAL ROLE OF THE JUDICIAL BRANCH DICTATES THAT *CHEVRON* DEFERENCE NOT BE APPLIED IN THE CONTEXT OF AN AGENCY’S DETERMINATION OF ITS OWN JURISDICTION.**

Perhaps realizing that their two major arguments were critically flawed, the Federal Respondents next attempted to bind this Court with previous rulings. This, however, was a major blunder by the Federal Respondents, because it actually highlights the fact that *Chevron* deference is an affront to the doctrine of the Separation-of-Powers. Specifically, the Federal

Respondents argue that “[t]here is no sound reason for this Court to alter its approach to interpretive questions bearing on the scope of agency authority.” See Fed.Resp.Br. 20. “*Chevron’s* central holding is that when a statutory provision is ambiguous, if the agency’s interpretation is based on a permissible construction of the statute,” the agency’s interpretation is to be given ‘controlling weight.’” Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 Admin. L. Rev. 433, 434 (2010) (quoting from *Chevron*, 467 U.S. at 844). As stated previously, while this standard may be acceptable with regard to policymaking, it is critically flawed when the inquiry shifts to examining an agency’s jurisdiction.

The idea that the judiciary should provide authoritative interpretations of statutory texts is longstanding and deeply embedded in our legal culture. This Court has proclaimed that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Furthermore, the principle that “[t]he interpretation of the laws is the proper and peculiar province of the courts” was a founding principle of this country. *Federalist No. 78* (A. Hamilton)(C.Van Doren ed. 1945). Finally, Article III of the Constitution establishes that the courts are the final arbiters of the meaning of the law. See *Legal Services Corp. v. Valezquez*, 531 U.S. 533, 545 (2001).

However, application of *Chevron* deference, in the context of an agency’s determination of its own jurisdiction, effectively contradicts this founding principle. Even more egregious is that this founding



principle is not violated for a formal branch of government, but rather for an independent, politically unaccountable agency. The FCC's supposed *Chevron* shield to judicial review of its jurisdiction results in an undermining of the principle of the Separation-of-Powers.

In addition to the founding principles of this nation, Congress has also expressed that the function of statutory interpretation is ultimately reserved for the courts. The Administrative Procedure Act (APA), which the Federal Respondents chose not to address even though it was raised in Petitioner's Brief on the Merits, states that courts "shall decide all relevant questions of law, interpret ... statutory provisions, and determine the meaning and applicability of the terms of agency action." APA, 5 U.S.C. §706 (2000). It also says that a reviewing court should hold any action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" to be unlawful. Id. §706(2)(C). It does not say that the courts should give any deference to the agency action, especially not in terms of determining jurisdiction. Rather, it recognizes jurisdiction as a distinct legal inquiry. See Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm & Mary L. Rev. 1463, 1524 (2000).

Since jurisdiction is a distinct *legal* inquiry, it should not be decided by agency interpretation, and certainly not by the agency who is attempting to assert the jurisdiction at issue. Our Constitution has established that the courts interpret the laws. The FCC certainly had the right to assert jurisdiction in this instance. However, the Fifth Circuit's application

of *Chevron* deference to the FCC's assertion really amounts to no review at all, as reversal would only be proper upon a finding of irrationality. Such a procedure is not in alignment with the founding principles of this country and should not be allowed to stand.

**(D) CONGRESSIONAL SILENCE OR AMBIGUITY, IN THE CONTEXT OF AN AGENCY'S JURISDICTION, SHOULD NOT RESULT IN *CHEVRON* DEFERENCE.**

A review of the briefs filed in this matter seemingly reveal that the crux of the disagreement between the Petitioners and the Respondents is this: For purposes of determining agency jurisdiction, does congressional silence or ambiguity inure to the benefit of the agency?<sup>1</sup> Petitioners contend that since agencies have no more jurisdiction than Congress has explicitly provided, if Congress is silent or ambiguous as to the scope of agency jurisdiction, the agency should receive no deference in connection with defining that scope. Respondents, on the other hand, contend that an absence of explicit limitation of general authority of an agency means that Congress intended no such

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<sup>1</sup> Obviously, where congressional intent is explicit there is no issue. Petitioners believe, and have argued, that congressional intent, denying FCC jurisdiction in this specific matter, is explicit in Section 332(c)(7). Respondents argue that because Section 332(c)(7) includes no express negation of the FCC's general administrative authority over the Communications Act, the FCC's jurisdiction is rooted in its general administrative authority. The Fifth Circuit held that the statute is silent on the existence of agency jurisdiction, and this Court did not grant certiorari on that issue.



limitation, and therefore the agency should receive substantial deference in connection with defining the scope of that authority.

This disagreement can be resolved by two simple principles – agencies have absolutely no inherent authority, and those limited by a law should not be empowered to determine, without substantial substantive review, the meaning of the limitation. Norman J. Singer, 3 *Statutes and Statutory Construction* §65.2 (2001).<sup>2</sup> Respondents' argument defies logic when applied to a statute that, in any way, confines or limits an agency's jurisdiction.<sup>3</sup> Courts certainly should not presume that Congress implicitly intended an agency to fill "gaps" in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). In other words, if the statute, in any way, confines the jurisdiction of an agency, application of any type of deference to agency action seizing jurisdiction is illogical. That is not to say that the ultimate inquiry will not result in the acceptance of agency jurisdiction. However, the determination of same must be by a fair, impartial, and logical process. Thus, although administrative agencies may be called upon from time

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<sup>2</sup> "[T]he general rule applied to statutes granting powers to [agencies] is that only those powers are granted which are conferred either expressly or by necessary implication."

<sup>3</sup> There is no question that Section 332(c)(7) limits the FCC jurisdiction in some respect. However, there is certainly disagreement as to the extent of that limitation.

to time to opine as to whether they have jurisdiction over a particular matter or issue, such opinions should not be entitled to deference by the courts. Removal of the courts ability to fully examine the jurisdictional question fails to be fair to the Petitioners, impartial to any of the parties, or logical to the statutory construction.

Given same, there is no logical basis to apply *Chevron* deference to an agency's determination of its own jurisdiction unless Congress has explicitly granted same. As a result, the Federal Respondents' interpretation, and argument resulting therefrom, must fail. Therefore, this Court should rule that the FCC's determination that it has jurisdiction in this matter should not be afforded *Chevron* deference.

## CONCLUSION

This Court granted certiorari on the issue of whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction. Petitioner established sound reasoning for the principle that unless Congress has indicated otherwise the answer to the inquiry should be in the negative. In response, the Federal Respondents attempted to re-frame the issue into one of policymaking. However, that was not the inquiry this Court wanted addressed, and the arguments advanced by the Federal Respondents are flawed.

With respect to expertise, courts have far more expertise interpreting statutory jurisdiction than agencies. Therefore, the Federal Respondents' special expertise argument lacks merit in connection with

jurisdictional questions. Furthermore, independent agencies, such as the FCC, have little to no political accountability because of the inability of the President or Congress to remove agency commissioners. Consequently, the Federal Respondents' political accountability argument lacks merit in connection with jurisdictional questions. Finally, the doctrine of the Separation-of-Powers, as well as the common sense doctrine of logic, dictate that *Chevron* deference not be applied in jurisdictional questions.

In the case at bar, the Fifth Circuit should not have mechanically applied *Chevron* deference to review the FCC's interpretation of its own statutory jurisdiction. Rather, it should have performed a *Chevron* Step 0 analysis, *de novo*, on the issue of whether Congress specifically delegated final interpretive authority over Section 332(c)(7) of the Telecommunications Act of 1996. Had such an analysis been done, the Fifth Circuit would have been required to apply the traditional methods of statutory construction and apply the presumption that Congress did not intend to expand the FCC's jurisdiction into an area of traditional State and local regulation.

Petitioner prays that this Court should apply *Chevron* Step 0 to facts and circumstances of this case, reverse the Fifth Circuit Judgment, and find that the FCC did not have authority to implement the 90 and 150 day time frames. Alternatively, Petitioner prays that this Court remand the matter back to the Fifth Circuit with instructions that it properly apply the *Chevron* analysis and the aforementioned presumptions to the facts and circumstances of this case.

Respectfully submitted,

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